Supreme Court, U.S.
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No. 93-701

In The

Supreme Court of the United States

October Term, 1993

CIRCUIT COURT OF THE FIRST CIRCUIT,
through the Honorable Marie N. Milks,
Criminal Administrative Judge
and
Robert A. Marks, Attorney General of Hawaii,

Petitioners,

vs.

DWIGHT O. DOW,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

EARLE A. PARTINGTON
PARTINGTON & FOLEY
2450 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813
(808) 526-9500

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether a person convicted of a state crime who is sentenced to attend a mandatory fourteen hour alcohol rehabilitation program is "in custody" so that he may invoke federal habeas corpus under 28 U.S.C. § 2254(a) to test the constitutionality of his conviction.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent DWIGHT O. DOW prays that the Petition for Writ of Certiorari be denied on the ground that this case does not meet any of the criteria for review by this Court.

OPINION BELOW

Respondent's state criminal conviction was reversed by the Hawaii Intermediate Court of Appeals on the

ground, *inter alia*, that this conviction violated the prohibition of double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution. *State v. Dow*, 8 Haw. App. 372, 803 P.2d 969 (1990). The Supreme Court of Hawaii granted certiorari and, holding that the prohibition against double jeopardy had not been violated, reversed the Hawaii Intermediate Court of Appeals. *State v. Dow*, 72 Haw. 56, 806 P.2d 402 (1991). Dow sought federal habeas corpus relief and the district court dismissed for lack of jurisdiction as Respondent is not "in custody" by virtue of his yet unexecuted sentence to a fourteen hour rehabilitation program. *Dow v. Circuit Court of the First Circuit*, 779 F. Supp. 139 (D. Haw. 1991). The United States Court of Appeals for the Ninth Circuit reversed the district court per curiam and without dissent. *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922 (9th Cir. 1993).

STATEMENT OF THE CASE

The underlying facts and history of this case are undisputed. The underlying facts are taken from the published opinion of the Hawaii Intermediate Court of Appeals case cited below. Respondent Dwight O. Dow (hereinafter "Respondent") was charged in state court of driving under the influence of intoxicating liquor in violation of Hawaii Revised Statute § 291-4(a) (1985). Although but a single offense was charged, the complaint was drafted in two counts, one count for each of the alternative methods of proof set out in § 291-4(a)(1) and (a)(2). At Respondent's first jury trial, the trial judge granted a judgment of acquittal as to count 1 and a

mistrial was declared as to count 2 because of a hung jury. The trial judge then entered a formal written judgment of acquittal as to count 1. Thereafter, over Respondent's objection that he had already been tried and acquitted of the charged offense, he was retired on count 2 and convicted. Respondent was sentenced to a $250.00 fine, a ninety day driver's license suspension, and attendance at a mandatory fourteen hour alcohol rehabilitation program. On appeal to the Hawaii Court of Intermediate Appeals, Respondent's conviction was reversed because Respondent had been tried twice in violation of the prohibition against double jeopardy in the Fifth and Fourteenth Amendments to the United States Constitution. *State v. Dow*, 8 Haw. App. 372, 803 P.2d 969 (1990). The Supreme Court of Hawaii granted certiorari and, finding no double jeopardy violation, reversed the Hawaii Intermediate Court of Appeals. *State v. Dow*, 72 Haw. 56, 806 P.2d 402 (1991).

Respondent sought federal habeas corpus pursuant to 28 U.S.C. § 2254 in the District of Hawaii renewing his double jeopardy claim. Respondent claims that he is "in custody" for the purposes of 28 U.S.C. § 2254(a) by virtue of the still unexecuted portion of his sentence that provided for attendance at a mandatory fourteen hour alcohol rehabilitation program. This program consists of the following:

> 2. [As the Driver Education Administrator for the State of Hawaii,] I am charged with administering the fourteen hour minimum alcohol abuse rehabilitation program mandated as part of the sentence imposed upon those persons convicted in the First Circuit of driving

under the influence of intoxicating liquor (DUI) pursuant to H.R.S. § 291-4(b)(1).

3. One and one half hours of this program consists of a meeting with Driver Improvement Advisor in the Advisor's office at the District Court of the First Circuit.

4. The remainder of the fourteen hour minimum program consists of attendance at classes at the District Court of the First Circuit held either over a three day period or a five day period.

5. The three day program is held over three consecutive days from 8:00 a.m. to 12:30 p.m. the first day and from 8:00 a.m. to 12:00 noon the next two days.

. . . .

7. Regardless of which programs is [sic] utilized, the convicted person must physically attend both the initial session with the counsel and the classroom portion of the instruction or [the Driver Education Office] will report the person to the court for noncompliance and a bench warrant will issue on the ground that the person is in contempt.

8. Physical attendance means that the person must actually be in the Advisor's office at the District Court during the interview and be in the classroom during the twelve and one half hour classroom program.

Affidavit of the Driver Education Administrator for the State of Hawaii in the district court below, Petition at 113a.

The State opposed the petition for a writ of habeas corpus on the ground that the attendance at the mandatory fourteen hour alcohol rehabilitation program did not constitute a significant restraint on Respondent's liberty, and thus jurisdiction did not lie under 28 U.S.C. § 2254(a). The district court agreed and dismissed the petition. *Dow v. Circuit Court of the First Circuit*, 779 F. Supp. 139 (D. Haw. 1991). On appeal, the Ninth Circuit disagreed and reversed the district court per curiam, holding that the rehabilitation program is a significant restraint on Respondent's liberty and thus there is jurisdiction under 28 U.S.C. § 2254(a). *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922 (9th Cir. 1993).

REASONS FOR DENYING THE WRIT

This petition presents no issue meriting this Court's review. There are no federal or state court opinions, other than those in the instant case, which even address the issue raised. Thus, there can be no conflict with any other circuit or state court of last resort. Further, the general principles applicable in this case were delineated by this Court in *Jones v. Cunningham*, 371 U.S. 236 (1963), and reaffirmed in *Hensley v. Municipal Court*, 411 U.S. 345 (1973), and the Ninth Circuit adhered to those principles in its per curiam decision which was without dissent. By any application of these principles, Respondent's sentence to attend the alcohol rehabilitation program constituted a significant restraint on his liberty.

A. The Decision of the Ninth Circuit Below Does Not Conflict with the Decision of any other Circuit, any Other Decision in the Ninth Circuit, or any Decision of a State Court of Last Resort.

Although Petitioners baldly assert in the Petition (at 13) that there is a conflict in the circuits, they fail to identify a single federal court of appeals case from *any* circuit or from any state which conflicts with the decision of the Ninth Circuit below. In fact, the instant case appears to have the *only* reported decisions in the United States on the questions presented. The uniqueness of the instant case is no better demonstrated than by this fact. Considering the aggressiveness of the drunk driving defense bar in this country over the past twenty years, it is inconceivable that the decision below will have any meaningful or significant impact on the federal courts. If federal habeas corpus were truly the Pandora's box that Petitioners claim it is (Petition at 15-16), this Pandora's box would have been discovered long before now.

B. Any Important Question of Federal Law Involved Here Was Settled in *Jones v. Cunningham*, 371 U.S. 236 (1963), and the Decision of the Ninth Circuit Below Conforms Completely with *Jones*.

In examining what constitutes being "in custody" for the purposes of complying with the jurisdictional prerequisite for habeas corpus, this Court in *Jones v. Cunningham*, 371 U.S. 236 (1963), held that:

> The habeas corpus jurisdictional statute implements the constitutional command that the

writ of habeas corpus be made available. While limiting its availability to those "in custody," the statute does not attempt to mark the boundaries of "custody" nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.

In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement. For example, the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will. The test used was simply whether she was "at her liberty to go where she please[d]." So also, habeas corpus was used in 1763 to require the production in court of an indentured 18-year-old girl who had been assigned by her master to another man "for bad purposes." Although the report indicates no restraint of the girl other than the covenants of the indenture, the King's Bench ordered that she "be discharged from all restraint, and be at liberty to go where she will." And more than a century ago an English court permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were "not under imprisonment,

restraint, or duress of any kind." These examples show clearly that English courts have not treated the Habeas Corpus Act of 1679, 31 Car II c.2 – the forerunner of all habeas corpus acts – as permitting relief only to those in jail or like physical confinement.

Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. This Court itself has repeatedly held that habeas corpus is available to an alien seeking entry into the United States, although in those cases each alien was free to go anywhere else in the world. "[H]is movements," this Court said, "are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion." Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service. The restraint, of course, is clear in such cases, but it is far indeed from the kind of "present physical custody" thought by the Court of Appeals to be required. Again, in the state courts, as in England, habeas corpus has been widely used by parents disputing over which is the fit and proper person to have custody of their child, one of which we had before us only a few weeks ago. History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus. [371 U.S. at 238-40, footnotes omitted.]

* * *

> It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. [371 U.S. at 242-43, footnote omitted].

The Ninth Circuit, in its decision, clearly applied the criteria from *Jones v. Cunningham* in finding the fourteen hour mandatory alcohol rehabilitation program to be a significant restraint on liberty. As that court said:

> The sentence in this case, requiring appellant's physical presence at a particular place, significantly restrains appellant's liberty to do those things which free persons in the United States are entitled to do and therefore must be characterized, for jurisdictional purposes, as "custody." Appellant "cannot come and go as he pleases." *Hensley*, 411 U.S. at 351. Moreover appellant suffers a greater restraint upon his liberty – mandatory class attendance – than the restraint suffered by a person who is released upon his own recognizance. *See id.* at 351-53 (holding that person released on recognizance is "in custody"). Because appellant is in custody within the meaning of 28 U.S.C. § 2254, he is

entitled to invoke federal habeas corpus jurisdiction. 995 F.2d at 923.

Since *Jones v. Cunningham*, the English courts have adhered to their long standing position as described in *Jones v. Cunningham*. In *Ex parte Mwenya*, [1960] 1 Q.B. 241, [1959] 3 All E.R. 525, the applicant had been subject to an order of the government of the British Protectorate of Northern Rhodesia (now the Republic of Zambia) restricting him within an area that was somewhat greater than 1,500 square miles in size. Within that area, the applicant was not subject to anything in the nature of detention or limitation of his movements. [1960] 1 Q.B. at 288-89. The applicant sought a writ of habeas corpus in England before the Queen's Bench Division (directed to the Secretary of State for the Colonies and other officials) claiming wrongful detention. The writ of habeas corpus did issue although the case was not decided on the basis of whether the applicant's restriction constituted a detention as would permit habeas corpus, the parties having assumed that the detention was sufficient. [1960] 1 Q.B. at 290, [1959] 3 All E.R. at 528. Obviously, the writ would not have issued if the court had thought that there was no detention. Certainly, if the English court concluded that restricting a person to 1,500 square miles was sufficient detention, then the Ninth Circuit properly concluded that the fourteen hour alcohol rehabilitation program was a significant restraint on Respondent's liberty.

In *Ghani v. Jones*, [1970] 1 Q. B. 693, [1969] 3 All E.R. 1700, in which a mandamus application was directed to the police to compel the return of confiscated passports,

the Master of Rolls, Lord Denning, stated that "[a] man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest of grounds." [1970] 1 Q.B. at 709, [1969] 3 All E.R. at 1706. The court upheld the lower court's order to return the passports. There appears little doubt that, in view of Lord Denning's language, habeas corpus would have been an alternative vehicle of review in this case. If confinement within a nation is a significant restraint on liberty, then *a fortiori* the alcohol rehabilitation program must be a significant restraint on liberty.

There is just nothing in any American or English case since *Jones v. Cunningham* was decided in 1963 to indicate that the radical departure sought by Petitioners from centuries of established precedent is warranted, let alone that this Court should readdress the fundamental principles confirmed in *Jones*. This is especially so as *Hensley v. Municipal Court*, 411 U.S. 345, 350-53 (1973), expressly confirmed the scope of the Great Writ as set out in *Jones*. The decision of the Ninth Circuit finding that Respondent was "in custody" is in clear conformity with the well-established scope of the Great Writ.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

DATED: Honolulu, Hawaii: January 31, 1994.

Respectfully submitted,

EARLE A. PARTINGTON
PARTINGTON & FOLEY
2450 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813

Counsel for Respondent